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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

JASON KIM,

Plaintiff,

vs.

THE GUARDIAN LIFE
INSURANCE COMPANY OF
AMERICA; and DOES 1 through 10,
inclusive,

Defendants.

Case No.: 8:23-cv-01579-DOC-ADS

Action Filed: August 23, 2023

Trial Date: April 15, 2024

**PLAINTIFF JASON KIM'S OPENING
TRIAL BRIEF**

DATE: April 15, 2024

TIME: 8:30AM

JUDGE: Honorable David O. Carter

CTRM: 10A, Santa Ana



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1 **1. INTRODUCTION**

2 Guardian Life Insurance Company of America (“Guardian”) denied Plaintiff
3 Jason Kim’s (“Plaintiff’s”) claim for long-term disability (“LTD”) benefits under a
4 group insurance policy (the “Policy”). It relied on a pre-existing condition
5 exclusion, *even though its own doctor, Elbert Greer Richardson, M.D., stated that*
6 *the pre-existing conditions did not cause or substantially contribute to Plaintiff’s*
7 *disability.* Dr. Richardson stated that “The conditions the claimant received advice,
8 treatment, or medication caused by, contributed to by, or resulting from those
9 conditions ... **did not** cause or contribute to the conditions that are impairing....”
10 (AR:5379)(Emphasis added) Guardian ignored this statement and the medical
11 records in its possession and relied on the pre-existing condition exclusion to deny
12 Plaintiff’s claim.

13 Plaintiff suffered from a myriad of very serious and disabling medical
14 symptoms. His health problems began in January 2021 when he developed COVID-
15 19. He started suffering from a variety of severe symptoms, including: brain fog,
16 cognitive impairments, extreme pacing (to the extent that he wore out a pair of shoes
17 in a couple of days), fever, chills, insomnia, panic attacks, restlessness, agitation,
18 “pressure in his head,” loss of the ability to communicate, short-term memory
19 damage, and damage to his ability to process information. He became psychotic.
20 Plaintiff’s treating physicians explained that this was likely caused by COVID-19.
21 Studies have shown that 1.4% of people develop psychosis when infected with
22 COVID-19.

23 Plaintiff was prescribed Zyprexa to treat his psychosis symptoms. He had
24 never been previously treated with Zyprexa, an antipsychotic medication. Zyprexa
25 substantially worsened his condition. He developed tardive akathisia (“TA”) and
26 tardive dyskinesia (“TD”).¹ Before Plaintiff recovered, he lost significant control of

27 _____
28 ¹ Akathisia and tardive dyskinesia, both caused by side effects of neuroleptic drugs

Footnote continues on next page...





1 his body, became suicidal, and nearly lost the basic ability to communicate.

2 Guardian, however, concluded that common anxiety, depression, and
3 attention deficient hyperactivity disorder (“ADHD”) were the cause of his disability
4 and were pre-existing conditions because Plaintiff had received treatment for these
5 prior non-disabling condition during the 3-month lookback period. Plaintiff’s
6 treating physicians and one of Guardian’s own doctors explain that this was
7 incorrect. Even Guardian’s own insurance broker attempted to dissuade Guardian
8 from denying the claim on that basis. Guardian insisted that the exclusion applied.
9 It insisted that nearly dormant and non-disabling history of anxiety and depression
10 caused or substantially contributed to Plaintiff’s disability. Regardless of whether
11 COVID-19 or something else caused Plaintiff’s condition in early 2021, his anxiety,
12 depression, and ADHD did not. His disability was caused by his psychosis, TA, and
13 TD. These were not preexisting conditions.

14 In denying the claim, Guardian received reports from three peer-review
15 doctors. It ignored Dr. Richardson’s conclusion. Arnold Lentnek, M.D. opined that
16 COVID-19 did not contribute to Plaintiff’s disabling symptoms. Of note, however,
17 Guardian did not provide Dr. Lentnek with Plaintiff’s medical records. It only
18 provided him with an inaccurate “abstract.” Leon Meytin, M.D., a neurologist,
19 provided an outrageous and conclusory opinion that Plaintiff was not disabled.
20 Significantly, because he was not sure, he also concluded that an Independent
21 Medical Exam (“IME”) should be performed. Guardian never ordered the IME.
22 It denied the claim based on the preexisting condition exclusion.

23 Plaintiff’s disability is well established and should not be disputed. Multiple
24 treating physicians, including Guardian’s own peer-review doctor, have certified

25 _____
26 such as Zyprexa, are serious neurological disorders. Akathisia is fundamentally a
27 subjective disorder characterized by a desire to be in constant motion resulting in an
28 inability to sit still and a compulsion to move. Tardive dyskinesia is an involuntary
movement disorder characterized by repetitive purposeless uncontrollable
movements. *See <https://pubmed.ncbi.nlm.nih.gov/6139392/>*



1 that Plaintiff could not work during the time in question. Plaintiff's medical records
2 and the statements from witnesses who observed his condition, overwhelmingly
3 established Plaintiff's disability. Because Plaintiff's clear disability was not caused
4 in any manner by medical conditions that were preexisting under the Policy,
5 Guardian's decision was wrong and the Court should enter judgment in Plaintiff's
6 favor.

7 **2. STATEMENT OF FACTS**

8 **A. The Policy's Terms**

9 Plaintiff is entitled to disability benefits if he is "Totally Disabled." The
10 Policy states:

11 **Total Disability or Totally Disabled** means that as a result of Sickness
12 or Injury, during the Elimination Period and the Own Occupation
13 period, You are not able to perform with reasonable continuity the sub-
14 stantial and material acts necessary to pursue Your Usual Occupation
and You are not working in Your Usual Occupation.(AR:273)

15 The Policy excludes coverage for pre-existing conditions. It states:

16 **Pre-Existing Conditions:** You are not covered for a Disability caused
17 or substantially contributed to by a pre-existing condition or medical or
18 surgical treatment of a pre-existing condition.

19 You have a pre-existing condition if:

- 20 • You received medical treatment, care or services for a diagnosed
21 condition or took prescribed medication for a diagnosed
22 condition in the three months immediately prior to the effective
23 date of Your insurance under this Certificate; or

24 You suffered from a physical or mental condition, whether
25 diagnosed or was misrepresented or not disclosed in Your
26 application (i) for which You received a Doctor's advice or
27 treatment within three months before the effective date of Your
28 insurance under this Certificate, or (ii) which caused symptoms
within three months before the effective date of Your insurance
under this Certificate for which a prudent person would usually
seek medical advice or treatment; and



- Disability caused or substantially contributed to by the condition begins in the first 12 months after the effective date of Your insurance under this Certificate.(AR:260-61)

The effective date of the Policy was May 1, 2020, making the 3-month “lookback” period run from February 1, 2020 through April 30, 2020.(AR:2715)

B. Plaintiff’s Occupation, Medical History and the Claims Process

Plaintiff started working for Dreamhaven, Inc. in mid-2020. He worked as an art director. (AR:1490) Through his work, he acquired LTD coverage with Guardian.

Before working at Dreamhaven, Plaintiff had a minor history of suffering from depression, anxiety, and ADHD. Before January 2021, these conditions were minor, non-disabling, and did not interfere with his work. (AR: 931, 1019-23, 1490-91, 2239, 3256) He was not seen by his therapist from 2019 to January 2021. (AR:2239) *His medical records and Guardian’s internal notes document that he had never been prescribed anti-psychotic medications or suffered from psychosis before January 2021.* (AR:556, 707, 987, 3411) The last relevant testing before January 4, 2021 listed Plaintiff as “Negative” for Depression and Anxiety. (AR:1019-23) Whereas in December 2020 he contacted his then-psychiatrist, Richard Moldawsky, M.D., about attempting TMS therapy, his conditions were sufficiently mild that he did not see Dr. Moldawsky until he developed severe health problems in January 2021. (AR:2239, 5581) When contacting Dr. Moldawsky in December 2020, he explained that his condition was not severe, but he was inquiring because some relatives had used the treatment and he wanted to try it. (AR:5581)

On or about January 4-5, 2021, this changed. Plaintiff started testing positive for severe depression and anxiety. Those symptoms appeared with a constellation of other symptoms that first arose in early January. He started to suffer from fever, chills, aches, hyperkinetic movement disorder, insomnia, cognitive deficits, “head





1 pressure,” restlessness, agitation, panic attacks, and “cognitive clouding.” He lost
2 the ability to organize his thoughts. His affect, cognition, and behavior were
3 significantly different. He became suicidal and paced all night. The pacing was
4 sufficiently severe that over a couple of days he wore out a pair of shoes. For the
5 first time, he developed psychosis. (AR:691, 695, 881, 931, 987, 2040, 2254, 3255-
6 56, 3258, 3274, 3411, 5380)

7 On January 7, 2021, Plaintiff tested positive for COVID-19. (AR:691, 931,
8 3258, 3411) He was symptomatic as of January 5. (AR:2040, 3258, 3411) He
9 certainly had COVID-19 when his January 4, 2021 symptoms started.² Plaintiff’s
10 medical records explain that COVID-19 can trigger a psychotic disorder in 1.4% of
11 people. (AR:708) They explain that COVID-19 likely caused Plaintiff’s sudden
12 onset of psychosis. They state: “Note: onset of psychosis and anxiety after covid in
13 January, medical literature support this is a possible sequelae.” (AR:707-08)
14 Plaintiff’s medical records from March 25, 2021 also noted that these changes were
15 a “possible post viral event[.]” (AR: 695) Robbin Holley, BHCM, a Guardian
16 employee, made a note that explained as follows:

17 The case could be strongly made [that] the problems with COVID-19
18 as well as his subsequent (& rather marked) problems with adverse
19 psychiatric medication reactions strongly exacerbated his MH issues.
20 One MD noted his problems as a possible sequela and noted recent
21 research showing that 34% of COVID-19 survivors subsequently
22 receive a neurological or psychiatric DC & 17% are specifically DX’s
23 with Anxiety.(AR:562-63)

24 Plaintiff’s condition was now very different. (AR:691, 931-32, 3255-56) He
25 no longer suffered from common low-grade anxiety or depression. (AR:3411) He
26 was prescribed and started taking olanzapine (Zyprexa) for psychosis. (AR:987,

27 ² On average, a person has COVID-19 for five days before the respiratory symptoms
28 show. See Dan Brennan, M.D., Coronavirus Incubation Period, WebMD, (January
10, 2024, 9:31 AM) <https://www.webmd.com/covid/coronavirus-incubation-period>.



1 3411, 4900-01) Plaintiff had never been treated with an antipsychotic medication.
2 (AR:691) He continued to take the medication until March 2021. (AR:1263)

3 Around this time, Plaintiff developed a shuffled gait, made rocking
4 movements, and suffered from “horrible” skin sensations. He constantly shook his
5 head, stared at the ceiling, and made unusual and grotesque positioning/movements.
6 He grunted, jerked his hands, twitched, and made abnormal uncontrollable facial
7 actions such as movements of the jaw and abnormal facial/eye movements. His
8 cognitive problems worsened. They continued to affect his memory, and he was
9 constantly confused. (AR:690-91, 931-32, 2040, 3255-56, 3258, 3411)

10 Plaintiff’s condition is recorded in various statements from his friends and
11 family. (AR:3253-54, 3255-56, 3273, 3276, 3909-12) Plaintiff’s wife is a therapist.
12 (AR:2268) She explained that:

13 In January 2021, Jason had a typical case of covid until around day 14
14 when he started to have a lot of pressure in his head. Within 24 hours
15 he lost his cognition and personality. He wasn’t able to sleep and it was
16 like seeing a completely different man. I’ve been married to him for 13
17 years and had never seen him so outside of himself. Doctors gave him
18 medication which helped him sleep again. After 4 days, the pressure in
19 his head dissipated and I thought he was finally recovering from a very
20 strange case of covid. He had pretty intense brain fog and insomnia ...
21 He stopped being able to read, he had an inability to stop moving,
22 he couldn’t communicate with coworkers anymore, he lost his ability to
23 process information and make decisions, and he lost his short-term
24 memory. From February to July, I was telling him the same things
25 every 5-20 minutes. He had no awareness of his sickness and could
26 only repeat what I tried to explain to him all day, though he seemed to
27 never fully process any new information. It was a horrible thing to
28 watch him lose his control over his mind, speech, body movements,
and lose all of his relationships, including with his children. Before his
neurological symptoms started, he loved to play and parent our
children[;] all of a sudden[,] he was so panicked [that] he went months
with almost no interaction with them. He was in a constant state of
writhing movements (made worse by Parkinson's medication they gave
him to try to stop the Akathisia disorder, the new medication caused
dyskinesia which causes really disfiguring facial and fully body



1 twisting movements.) At the same time[,] his cognition made no sense
2 and was illogically agitated. He couldn't sit down[,] and I could barely
3 keep him alive until August when we put him on a new medication for
the movement disorder.

4 He still has akathisia which causes difficulty just being in his skin. He
5 is constantly uncomfortable. For most of the day he's just trying to
6 figure out ways to be in his skin and also trying to do occupational
7 therapy because he hates being unemployed. He still can't manage his
8 thoughts, they're often illogical and his judgement skills are still not
9 there. His movements get increasingly worse when agitated. He would
10 be unable to sit in meetings or even video calls due to his facial and
11 body movements. He isn't able to have a "poker face" anymore and
12 every uneasy thought will have a dystonic or dyskinesia movement to
13 go with it. Once he's even mildly agitated[,] his hips, legs, start to
14 writhe and he can't control his facial movements or his groaning or
15 vocal tics. He doesn't have functionality. His processing is still
16 limited[,] and he still gets physically and emotionally wiped out after
17 interacting with others for even short periods of time....

18 He needs constant coaching throughout the day and help to manage
19 tasks and to stay calm. He still doesn't have a perception of time and
20 can't manage his very detailed medication schedule. He has an
21 extremely difficult time starting any task or even taking our dog outside
22 on a walk or going outside with our kids. He still has great difficulty
23 engaging in simple daily living skills....(AR:3255-56)

24 Mrs. Kim's parents are also licensed therapists. (AR:3910) In a statement,
25 they explained:

26 ... we experienced Jason in a way that we had never seen him in the
27 many years we have known him. We were shocked by the stark
28 contrast of how he was compared to the Jason we have known since the
beginning of his marriage to Rachel. He constantly had to move his
body in grotesque, involuntary ways. He frequently shook his head
violently from side to side. He was unable to sit still and felt driven to
pace back and forth and all around the house. He frequently did face
grimaces which he was unaware of doing. He had balance problems[,]
which was evidenced in his walking, gait, and if he tried to do anything
where he needed good balance....

Jason also had problems with speech. He could not generate sentences
with more than about three words, and his generation of even these
short phrases took a lot of time. He had trouble comprehending normal



1 conversation. It was obvious, it took him a long time to process
2 information as evidenced by his slowness in responding to questions
3 and his difficulty tracking normal conversations. He had severe short
4 term memory problems. It was typical to have a short conversation with
5 him, and he would not be able to remember any of it 30 minutes later.
6 Several times on this visit, we thought we had conversations that were
7 important only to find that he could not remember any of the conversa-
8 tion within a few hours, and he certainly could not remember anything
9 we talked about in previous days. Jason could not comprehend what he
10 would read. He would read one paragraph and not be able to tell you
11 what it was about. In contrast to the bright, analytic, able to learn
12 anything Jason that we had known prior to January 2021, he was
13 confused by conversations, words, and could not learn from reading or
14 watching videos. We had never seen Jason this way. Where we had
15 always experienced Jason as organized, creative, able to understand
16 complex information, good at making decisions and analyzing the
17 outcomes, good awareness of self and how he works inside, we were
18 confronted with his inability to understand and remember even simple
19 things, his inability to make decisions or even understand what
20 decisions need to be made, and certainly his ability to be analytical
21 because he could not remember, he could not process information if he
22 remembered it, and this also meant he couldn't analyze outcomes or
23 organize things enough to make coherent sense of them. His previous
24 creativity [-] his sketching and drawing when we were around him [-]
25 had all disappeared. He could not create art. He could not even copy
26 art. He had trouble remembering to eat. He was unable to drive because
27 of slow processing and his uncontrollable body movements and his
28 general problems with comprehending things as simple as stop lights or
traffic signs.

We also observed changes in Jason's emotions and his perception of
himself. He was highly agitated. Since we are both licensed therapists,
we have diagnosed and treated many patients with anxiety. What Jason
was experiencing seemed far more associated with his uncontrollable
body movements and his inability to process verbal and visual infor-
mation than any anxiety cases we have seen in our many years of
practice. He had great difficulty showering because he said the water
hurt his skin. He said his skin burned underneath, and the uncontrol-
lable movements helped relieve that some. He made uncontrollable
vocalizations such as moaning, grunting, and sometimes short words.
When it was pointed out to him that he did this, he seemed unaware.
It was like his ability to regulate himself—his body, his emotion, his



1 speech, his creativeness, and organization—was gone. He was having
2 trouble sleeping and could only get 3-4 hours of sleep.(AR3910-11)

3 Initially, Plaintiff treated with Dr. Moldawsky. (AR:2239) Plaintiff's wife
4 argued with Dr. Moldawsky that Plaintiff's cognitive problems were related to
5 COVID-19. (AR:786) Dr. Moldawsky acknowledged that it "could be true in part"
6 but considered the psychiatry issues "more salient." (AR:786) Plaintiff transferred
7 to the care of Robert Lee, D.O., M.S. in May 2021. (AR:928) Dr. Lee certified that
8 Plaintiff was unable to work and noted that "patient with significant symptoms and
9 far from baseline functioning, significant anxiety and depressive symptoms from
10 movement problems...." (AR:1223, 1381-82)

11 Plaintiff attempted to see a neurologist, but the referral was cancelled.
12 (AR:2334) Plaintiff went to the hospital on March 25, 2021. (AR:1257) Plaintiff
13 finally managed to treat with a neurologist, Carolyn Neff, M.D. She diagnosed
14 Plaintiff with TA and TD. (AR:695) TD and TA are movement disorders
15 characterized by involuntary movements. These conditions also produce a myriad
16 of mental health problems. The Zyprexa had caused Plaintiff's TA and TD.
17 (AR:3274-75) *Plaintiff's condition became so severe that he had to be hospitalized*
18 *in March and April 2021 for attempted suicide.* (AR:1326, 2715)

19 These medical conditions significantly impaired Plaintiff's ability to work.
20 Initially, at times, they would be dormant. During others, they would be significant.
21 His symptoms continued to worsen until he could not work. (AR:988) Dr. Neff
22 certified Plaintiff's disability. (AR:659, 681) Plaintiff submitted a claim for LTD
23 benefits asserting a date of disability of March 25, 2021. (AR:2714)

24 To treat his condition, Plaintiff was prescribed a variety of medications and
25 underwent psychotherapy. Some of the medications caused severe side effects.
26 Ultimately, he was prescribed medications that provided limited benefit. (AR:3262)

27 On May 10, 2021, Plaintiff underwent a neuropsychological evaluation that
28 revealed that he suffered from "Mild Neurocognitive Disorder." (AR:987-90) He





1 tested below average in a range of different aspects of “processing speed, timed
2 verbal fluency, immediate and delayed verbal memory for a list learning task, and
3 immediate visual memory.” (AR:990) “He was impaired with immediate and
4 delayed verbal memory for stories read to him.” (AR:990)

5 Kenneth Martinez, M.D., a neurologist, started treating Plaintiff on May 11,
6 2021. (AR:3266) Dr. Martinez completed an “Attending Physician’s Statement of
7 Disability” (“APS”) for Guardian stating that Plaintiff could not return to work until
8 at least July 20, 2022. He explained that Plaintiff “has uncontrolled movements due
9 to tardive dyskinesia and is unable to stay in one position due to tardive akathisia.”
10 (AR:2694) Plaintiff’s TA and TD were “not consistent with a conversion disorder
11 or anxiety.” (AR:3260) Whereas his TA and TD had improved some, the
12 symptoms were “still magnified with anxiety and stimulants.” (AR:3260)

13 Guardian informed Mrs. Kim that the pre-existing condition clause may
14 apply. (AR:2062) Mrs. Kim informed others of Guardian’s position. The insurance
15 broker responsible for selling Dreamhaven the Policy sent an email to Guardian. It
16 stated:

17 We are needing some help. Dreamhaven employee Jason Kim who
18 you have been helping us on a few things with is having a terrible time.
19 He exhausted STD, and is now working through the LTD claim, but
20 Guardian is coming back saying there is a pre-ex[isting condition]
21 situation. His current ability is a severe health situation, that we
22 believe started due to him contracting COVID-19 (well within his
employment). Guardian is saying because he had some previous
medical notes on anxiety, they will exclude and deny LTD.

23 **This feel[s] extremely immoral to us.**

24 **It is clear that the situation is not a pre-ex from anxiety... as I’m**
25 **sure you can understand, anxiety is a very common diagnosis**
which many have, and this is a severe health case.

26 We need to partner with Guardian and Burnham to do the right thing.

27 This family is facing horrors. They have small children and without
28 the LTD benefit they will lose their livelihood. The frustration from
ownership is immense and at this point they are so disappointed with



1 this benefit that they have invested in ... feeling little faith – let’s fix
2 this.

3 HELP!(AR:2025-26)(Emphasis added).

4 On July 13, 2021, Jennifer Larocco, a regional service manager for Guardian,
5 sent an email to Jennifer Baker, one of Guardian’s LTD case managers. She wrote:

6 Do we have reason to believe that this person may have had a serious
7 medical condition or underlying condition prior to contracting covid?
8 It will certainly help Mike in his explanation to the Broker and also
9 help with some credibility if we have some additional information
10 without disclosing too much due to HIPAA. I know A LOT of people
11 are developing long term problems due to covid that were perfectly
12 healthy before[.] I’m sure we get this question all the time, trying to
13 help with the perception from the Broker and Client as to why we are
14 doing further investigation.(AR:2061)

15 Ms. Baker responded by explaining that “The records do not indicate prior
16 treatment for some of the employee’s current complaints.” (AR:2060) Mrs. Kim
17 contacted Guardian as part of the ongoing claims process. She reiterated that
18 Plaintiff had always been a high functioning individual and only occasionally
19 required treatment for medications. (AR:2701)

20 Guardian denied the claim by letter dated August 18, 2021, concluding that
21 while Plaintiff was disabled, his disability was caused by pre-existing conditions
22 that were excluded under the Policy. (AR:2714, 2716-17) It stated:

23 Upon review of your prescription history, you were prescribed
24 Lexapro, an SSRI used to treat depression and anxiety. You were
25 given 100 days of refills, at 1 pill a day, with 1 refill. This would imply
26 you were taking this medication for the period of November 18, 2019
27 through June 4, 2020, during our lookback period of February 1, 2020
28 through April 30, 2020. Your psychiatric impairment is considered
pre-existing as a result of this.

...

Because you received treatment for your Major Depressive Disorder,
Severe without Psychotic Symptoms, Generalized Anxiety Disorder,
and Mild Neurocognitive Disorder during the “look-back period”, these
conditions and all related conditions and/or complications are pre-
existing conditions as defined by the Plan.(AR:2715-16)





1 It is unclear if Guardian concluded that Plaintiff was not disabled from his
2 debilitating TA/TD. It stated only that they were not caused by COVID-19, that
3 these conditions were the result of taking Zyprexa and “that the symptoms should
4 resolve in several months once the medications fully leave your system.”
5 (AR:2715-16) Of note, Plaintiff was not diagnosed with “Mild Neurocognitive
6 Disorder” until May 10, 2021. (AR:987-90) As for his depression and anxiety, as
7 noted above, these conditions were mild, nondisabling, and he did not see his
8 psychiatrist during the lookback period or the entire year before. (AR:1019-23,
9 2239)

10 Guardian’s broker continued to argue against the exclusion applying. An
11 August 24, 2021 email to Ms. Baker stating that “*The broker and employer are*
12 *convinced [that] this condition was triggered by the onset of Covid which I am told*
13 *was diagnosed after our policy was in place.*” (AR:3125)

14 On February 7, 2022, Plaintiff appealed the denial of his claim. (AR:3238)
15 Plaintiff submitted updated medical records and statements from his friends, his
16 family, Dr. Lee, and Dr. Martinez. (AR:3240) Dr. Martinez explained:

17 Jason continues to have uncontrolled movements that are magnified by
18 increased adrenaline and medication stimulants. These movements are
19 still consistent with his original diagnoses of TD and TA. Jason’s
20 movements worsen when he is anxious and is [sic] consistent with his
21 diagnoses of TD and TA. His movements are not distractible or
22 consistent with a conversion disorder. Jason’s movement may improve
23 as his anxiety is better controlled, but his underlying movement
24 disorder is a neurological disorder, not a mental health condition.
25 Jason’s movement disorder causes him to be unable to stay in a
stationary position on the computer or in meetings for extended
periods, and a stressful work environment would only exacerbate his
movements. Therefore, it is our recommendation that Jason Kim does
not work until his symptoms are better controlled.(AR:3274-275)

26 Plaintiff also included a letter from Dr. Lee, who explained:

27 Jason has a disorder that causes certain functional limitations. The
28 symptoms that he is currently exhibiting[,] however[,] are not due to
depression, anxiety, or ADHD. His current difficulties with



1 movements, cognitive slowing are neurologic in nature. It is unclear at
2 this time as to what has caused these problems[,] but likely[,] a side
3 effect to a trial of medication for mental health is implicated. The
4 patient's current ability to function is impaired to the extent that he is
5 not able to work. Recovery has been slow[,] but patient has been
engaged and has been doing what he can to reach a state of being more
independent and functional. Please reconsider Mr. Jason Kim's
claim.(AR:3270-271)

6 Guardian submitted Plaintiff's medical records to Dr. Meytin. Dr. Meytin
7 concluded that:

8 From a physical neurological perspective, there were no restrictions
9 placed.

10 This is a claimant with significant psychiatric history of anxiety,
11 depression, suicidality. When started on Zyprexa in January 2021,
12 it appears that the claimant developed akathisia and possibly tardive
13 dyskinesia. Zyprexa was stopped[,] and symptoms seemed to
14 improve[,] although it is unclear if they fully resolved. However, by
03/25/2021 (time period of review), there is no indication that the
tardive symptoms were severe enough to lead to restrictions. The
majority of his issues were psychiatric in nature, including suicidal
ideation and attempts, as well as psychiatric inpatient admissions.
Repeat notes document that the claimant continues with anxiety,
depression, suicidal thoughts, racing thoughts, overwhelming thoughts,
repetitive movements....

17 The claimant was started on Zyprexa on 1/20/2021 for severe anxiety,
18 depression, and suicidal ideation. It was then stopped due to tardive
19 symptoms. Thus, January 2021 would be the start of the tardive
20 symptoms. From a physical neurological perspective, there were no
restrictions placed.(AR:5415-16)

21 In a letter dated August 30, 2022, Dr. Martinez responded to Dr. Meytin's
22 report:

23 I have been presented with the report produced by Dr. Leon Meytin.
24 I strongly disagree with his position that Mr. Kim was not disabled due
25 to his Tardive Akathisia ("TA") and Tardive Dyskinesia ("TD"). These
26 neurological conditions were quite severe and left him unable to
27 perform many basic activities required to perform his job. Contrary to
Dr. Meytin's assertions, Mr. Kim's TA and TD affected nearly every
aspect of Mr. Kim's life and left him unable to work.(AR:5447)



1 In an addendum, Dr. Meytin, noting there was a “discrepancy” about Plaintiff’s
2 condition, recommended that Guardian conduct an IME:

3 Additional records did not provide any new abnormal neurological
4 exams, abnormal imaging, or any other neurological information that
5 would change my original opinion....

6 If there continues to be discrepancy with the claimant[’]s possible
7 restrictions, **a formal IME would be most prudent[,] as I do not
8 physically examine or evaluate the claimant, and am only supplied
9 with medical records to review.**(AR:5455-56)(Emphasis added).

10 Guardian submitted Plaintiff’s medical records to Dr. Lentnek. Dr. Lentnek
11 concluded that Plaintiff was not disabled due to complications related to COVID-19.
12 He stated:

13 Although the claimant's attorney indicates in the 2/7/22 letter that
14 Olanzapine was started due to COVID-19, this is not so, as evidently,
15 per the 1/20/21 report, Olanzapine was started for the claimant's severe
16 anxiety and panic state after he had a positive COVID-19 test. Since
17 March 2021 the claimant reported symptoms described as long-haul
18 COVID-19. He reported cognitive difficulties, slow thinking, and brain
19 fog. Attending physicians noted that a psychiatric etiology to these
20 cognitive issues was a more salient factor, but the claimant and his wife
21 are convinced that these issues are due to COVID-19. Medical infor-
22 mation does not provide verifiable evidence of this.(AR: 5409-10)

23 However, of note, Dr. Lentnek was not provided with Plaintiff’s medical records.

24 As Dr. Meytin explained in his report:

25 **Dr. Lentnek states he had access to only "abstracted" records,** but
26 **based on what he was provided,** the claimant had a mild course of
27 COVID-19 and that would not cause any
28 restrictions.(AR:5417)(Emphasis added.)

Dr. Lentnek based his opinion solely on what Guardian wanted him to see. If he had
read Plaintiff’s records, he would have noted that some of Plaintiff’s medical
records did state a causal relationship between his COVID-19 and his January
conditions and that his treating physicians **did** consider COVID-19 as a possible
cause of the condition. (AR:695, 707-08) Guardian submitted the medical records



1 to Dr. Richardson, a psychiatrist. (AR:5375) He explained that the treatment
2 Plaintiff received in the lookback period *did not cause or contribute to his*
3 *disabling conditions* as follows:

4 The claimant has restrictions and limitations as of 3/25/21...
5 **The conditions the claimant received advice, treatment, or**
6 **medication caused by, contributed to by, or resulting from those**
7 **conditions between 2/1/20-4/30/20; did not cause or contribute to**
8 **the conditions that are impairing as of 3/25/21.**(AR:5379)(Emphasis
added).

9 Dr. Richardson found that Plaintiff was disabled from January 2021 through
10 July 4, 2021 due to his TA/TD and psychological conditions. (AR: 5379-81)

11 On September 30, 2022, Guardian denied Plaintiff's appeal. (AR:5462) It
12 ignored Dr. Meytin's recommendation that an IME be performed. (AR:5465-66) It
13 also only briefly discussed Dr. Richardson and **completely ignored his conclusion**
14 **that Plaintiff was disabled for reasons that were not "caused by, contributed to**
15 **by, or resulting from" pre-existing conditions.** (AR:5466) It also relied on Dr.
16 Lentnek's uninformed opinion. (AR:5466) Guardian erroneously stated that
17 "While Plaintiff did have Covid-19 in early January 2021, there was no mention in
18 the records that these symptoms were related to Covid-19 but that he had a history
19 of anxiety and depression, for which he had admitted had started to become worse
20 prior to January 1, 2021." (AR:5466) These statements are false. Guardian
21 concluded by stating that Plaintiff was only disabled due to conditions falling under
22 the pre-existing condition exclusion, and, therefore, the claim was denied.
23 (AR:5466)³
24
25
26
27
28

³ Plaintiff notes that his condition gradually improved. He was able to return to work on a part time basis in March 2022.



1 **3. GUARDIAN’S CLAIM DENIAL WAS INCORRECT**

2 **A. Standard of Review**

3 The standard of review is de novo.⁴ Under a de novo review, the Court
4 undertakes an independent and thorough inspection of the administrative record
5 without giving any deference to the insurer’s findings, *Silver v. Executive Car*, 466
6 F.3d 727, 728, 733 (9th Cir. 2006), to freshly evaluate whether Guardian erred in
7 denying Plaintiff’s claim, *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th
8 Cir. 1999).

9 **B. Guardian Improperly Relied on the Pre-Existing Condition**
10 **Exclusion**

11 Guardian erred in relying on the pre-existing condition exclusion and denying
12 Plaintiff’s claim. It ignored the report from one of its medical professionals. It
13 failed to provide complete records to another. Its conduct was egregious.

14 Because Guardian relied on a Policy exclusion, it has the burden to establish
15 that the exclusion applies. *See Dowdy v. Metropolitan Life Ins. Co.*, 890 F.3d 802,
16 810 (9th Cir. 2018). The court in *McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129
17 (9th Cir. 1996), determined that the proper standard is whether a preexisting
18 condition “substantially contributed” to the loss, “even though the claimed injury
19 was the predominant or proximate cause of the disability.” *Id.* at 1136.

20 The Ninth Circuit addressed what constitutes substantial contribution. In
21 *Dowdy*, the insured Tommy Dowdy had diabetes. He was in a car accident that
22 nearly amputated his lower leg. His group accidental death and dismemberment
23 policy with MetLife covered a complete amputation. His leg was amputated below
24 the knee due to his comorbidities and his original injury from the car
25 accident. Dowdy’s diabetes contributed to the complications with his wounds and
26 to the amputation. He submitted a claim for the dismemberment. MetLife denied
27 his claim based on the policy’s insuring clause – which required that an accident be

28 ⁴ The parties have agreed that this is the standard of review.



1 the “direct and sole cause” of the amputation “independent of other causes” – and
2 the exclusion for losses “contributed to by ... illness.” MetLife asserted that
3 Dowdy’s diabetes contributed to the amputation. *Id.* at 805-07, 811.

4 The court held that the loss was covered because diabetes was not enough of a
5 causative factor to meet the “substantial contribution” test. *Id.* at 808. The court
6 explained that “[i]n order to be considered a substantial contributing factor for the
7 purpose of a provision restricting coverage to direct and sole causes of injury, a pre-
8 existing condition must be more than merely a contributing factor.” *Id.* at 809. The
9 court reasoned that “a ‘predisposition’ or ‘susceptibility’ to injury does not
10 necessarily amount to a substantial contributing cause. A mere ‘relationship’ of
11 undetermined degree is not enough.” *Id.* at 808.

12 The court examined a variety of sources to determine what should be deemed
13 a substantial cause. One respected source explained that the word “substantial”
14 denotes that the conduct had an effect strong enough that it would lead “reasonable
15 [people] to regard it as a cause” in the more concrete sense and not just in some
16 “philosophic sense.” *Id.* at 809. The court held that there must be evidence showing
17 that the preexisting ailment contributed a “significant magnitude of causation” and
18 was a “substantial catalyst.” *Id.* The preexisting condition cannot “merely [be]
19 related to the injury” (*Id.*) and it cannot merely be a “predominant or proximate
20 cause of the disability.” *McClure, supra*, at 1136.

21 An examination of Plaintiff’s symptoms shows just how unreasonable
22 Guardian’s position is. He had not seen a therapist in years and his test results show
23 that the symptoms for his depression and anxiety were minimal. (AR:1019-23,
24 2239) Whereas he had arranged for a visit to see his psychiatrist before his
25 condition worsened, he waited a month before he saw that doctor and said that it
26 was not an emergency. (AR:2239, 5581) In early 2021, however, he started
27 suffering from a variety of severe symptoms, including: psychosis, brain fog,
28 cognitive impairments, extreme pacing, fever, chills, insomnia, panic attacks,



1 restlessness, agitation, “pressure in his head,” loss of the ability to communicate,
2 short-term memory damage, and damage to his ability to process information.
3 (AR:691, 695, 881, 931, 987, 2040, 2254, 3255-56, 3258, 3274, 3411, 5380) **He**
4 **clearly was no longer suffering from common anxiety or depression.** To link his
5 minimal prior treatment and barely recognizable anxiety/depression to this array of
6 severe symptoms defies reason.

7 Dr. Richardson informed Guardian that there was no connection. Dr.
8 Richardson stated that “The conditions the claimant received advice, treatment, or
9 medication caused by, contributed to by, or resulting from those conditions between
10 2/1/20-4/30/20; did not cause or contribute to the conditions that are impairing as of
11 3/25/21.” (AR:5379) An examination of Dr. Richardson’s report shows that he was
12 aware of Plaintiff’s mental health history. He spoke with Dr. Lee and received
13 medical records from the period in question. (AR:5375, 5378) He concluded that
14 the conditions and treatment therefore did not cause or contribute to the disability.

15 This is a direct refutation of Guardian’s position. This refutation is
16 particularly problematic for Guardian. The alleged pre-existing conditions were
17 mental health issues. Guardian’s psychiatrist stated that those conditions and their
18 treatment **did not** cause or contribute to Plaintiff’s impairing conditions *at all*, let
19 alone *substantially*.

20 Plaintiff’s medical records make it explicitly clear that COVID-19 has been
21 shown to cause psychosis and was potentially the cause here. (AR:695, 707-08)
22 Even Guardian’s own employee acknowledged this. (AR:562-63) Whereas
23 Plaintiff and his treating physicians believe that COVID-19 triggered his health
24 problems in early 2021, that causality is not legally necessary for Plaintiff’s claim.
25 All that is required is that whatever rendered Plaintiff disabled not be caused or
26 substantially contributed to by a pre-existing condition. Whether it was COVID-19
27 or just a spontaneous breakdown of Plaintiff’s mental health is irrelevant. The
28 question is whether the prior identified mental health conditions/treatments *in the*



1 *lookback period* “caused or substantially contributed to” the disability. *They did*
2 *not.*

3 Guardian cannot reasonably rely on Dr. Lentnek’s opinion. Dr. Lentnek
4 opined that COVID-19 did not cause Plaintiff’s conditions. He stated that none of
5 Plaintiff’s treating physicians thought there was a connection. That is incorrect.
6 (AR:695, 707-08) Dr. Lentnek could not have known that he was mistaken because
7 *Guardian did not provide him with the relevant records.* It only provided him with
8 an abstract thereof missing key information such as research showing a causal
9 connection between COVID-19 and psychosis.

10 The summary that Guardian provided was not even accurate. Dr. Lentnek
11 states that Plaintiff’s brain fog, head pressure, and slow thinking started in March
12 2021. (AR:5409) In fact, they started in January 2021. (AR:690, 2040, 3255,
13 3411) He could not know whether Plaintiff’s condition was caused by COVID-19.

14 He states that “Medical information does not provide verifiable evidence” that
15 COVID-19 caused Plaintiff’s condition. However, because he was never provided
16 with Plaintiff’s medical records, he could not know this. The weight of the opinion
17 of a single paper-review doctor who did not even review the relevant medical
18 records should not persuade the Court. The opinions of Plaintiff’s treating
19 physicians carry far more weight. *See Williams v. United of Omaha*, 2013 WL
20 5519525, at *12 (N.D. Ala. Sept. 30, 2013), citing *Black & Decker Disability Plan*
21 *v. Nord*, 538 U.S. 822, 832 (2003); *see also Kibel v. Aetna Life Ins. Co.*, 2015 WL
22 858751, *7 (C.D. Cal. Feb. 26, 2015); *Hodjati v. Aetna Life Ins.*, 2014 WL 7466977,
23 *14 (C.D. Cal. Dec. 29, 2014).

24 Furthermore, Plaintiff’s family includes numerous therapists. They
25 understand common anxiety and depression. They quickly realized that whatever
26 was happening to Plaintiff was not his prior low-grade anxiety and depression.

27 The Policy does not support the extensive chain of causation that Guardian
28 relies on. It inquires whether a pre-existing condition, or treatment related thereto,



1 “caused or substantially contributed” to the disability. Plaintiff’s prior treatment for
2 his depression, anxiety, and ADHD during the lookback period had no connection
3 whatsoever with his disability. He also was not disabled for common anxiety or
4 depression. As Guardian’s insurance broker noted, “It is clear that the situation is
5 not a pre-ex from anxiety ... as I’m sure you can understand, anxiety is a very
6 common diagnosis which many have, and this is a severe health case.” (AR:2025-
7 26) Guardian’s application of the Policy language made a “very common
8 diagnosis” a pre-existing condition for countless maladies. There is no medical
9 basis for this conclusion. Guardian cannot carry its burden.

10 **C. Plaintiff Was Disabled Under the Policy**

11 Given that the pre-existing condition exclusion does not apply, the Court must
12 examine whether Plaintiff was disabled. The evidence shows that he clearly was.

13 Dr. Richardson determined that Plaintiff was totally disabled from January
14 2021 through July 4, 2021, the date Dr. Lee gave as Plaintiff’s expected return to
15 work date. (AR:5379-80) Dr. Richardson based this conclusion on Plaintiff’s
16 TA/TD. (AR:5380) However, the evidence establishes that Plaintiff was still
17 disabled well after that time period. (AR:2694, 3270-71, 3274-75) An examination
18 of Dr. Richardson’s report shows that he was not provided with this evidence and
19 could not know that Plaintiff was disabled beyond that date. (AR:5375-77)

20 Plaintiff’s own physicians also determined that Plaintiff was disabled. Dr.
21 Lee, certified that Plaintiff could not work as of October 26, 2021. As he explained
22 in a statement, “The patient’s current ability to function is impaired to the extent that
23 he is not able to work.” (AR:3270-71)

24 Dr. Martinez and Dr. Neff both concluded that Plaintiff could not work.
25 (AR:659, 681, 3274-75) In a July 22, 2021 APS, Dr. Martinez explained that
26 Plaintiff had an expected return to work date of July 20, 2022. (AR:2694) In a
27 statement as late as October 25, 2021, Dr. Martinez continued to certify that Plaintiff
28 was disabled due to his TA and TD. (AR:3274-75)



1 To the extent that Guardian took the position that Plaintiff was *not* disabled
2 due to TA and TD, that position is meritless. Whereas Dr. Meytin opined that
3 Plaintiff was not disabled, he also recommended that an IME be performed and that
4 Plaintiff's condition be examined by "neuropsychology." (AR:5415, 5456) *Even*
5 *Dr. Meytin conceded that his paper review may be insufficient.* The failure to
6 follow its doctor's recommendation showed Guardian's improper bias in denying
7 the claim. *See Evans v. Sun Life & Health Ins. Co.*, 601 F.App'x 497, 498 (9th Cir.
8 2015).

9 Dr. Meytin's report fails to explain the basis of his position. It makes a few
10 references to a lack of evidence, but, Plaintiff had provided explanations and
11 medical records from his neurologist that explained his condition and documented his
12 treatment. Dr. Meytin's statements to the contrary are copy-and-paste excuses used
13 to deny a claim. Courts regularly criticize this very type of report: brief with no
14 analysis. *See, e.g., Brainard v. Liberty Life Assurance Co. of Boston*, 173 F.Supp.3d
15 482, 492 (E.D. Ky. 2016).

16 Guardian's failure to consider the statements from Plaintiff's friends and
17 family is yet another reason to reject its analysis and conclusion. *See Demer v. IBM*
18 *Corp. LTD Plan*, 835 F.3d 893, 904-07 (9th Cir. 2016); *Kibel v. Aetna Life Ins. Co.*,
19 725 F.App'x 475, 477 (9th Cir. Feb. 13, 2018). This conduct is particularly
20 egregious in Plaintiff's case. Mrs. Kim and her parents are certified to treat people
21 who suffer from mental health problems. Their statements described the horrors
22 that Plaintiff was experiencing and his family was witnessing. Plaintiff was clearly
23 disabled by his TA and TD and these conditions were in no manner caused or
24 substantially contributed to by preexisting conditions.

25 **4. CONCLUSION**

26 For the above-stated reasons, this Court should find that Guardian improperly
27 denied the claim, and grant judgment in Plaintiff's favor.



1 Dated: March 4, 2024

McKENNON LAW GROUP PC

2 By: 

3 ROBERT J. McKENNON
4 NICHOLAS A. WEST
5 ERIK C. FRITZ
6 Attorneys for Plaintiff, Jason Kim
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16 **CERTIFICATE OF COMPLIANCE WITH L.R. 11-6.1**

17 The undersigned, counsel of record for Plaintiff Jason Kim, certifies that this
18 brief contains 6,969 words (excluding the caption, any table of contents, any table of
19 authorities, the signature block, this certification, and any indices and exhibits),
20 which complies with the word limit of Local Rule 11-6.1.
21

22 Dated: March 4, 2024

McKENNON LAW GROUP PC

23
24 By: 

25 ROBERT J. McKENNON
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27 ERIK C. FRITZ
28 Attorneys for Plaintiff, Jason Kim



CERTIFICATE OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 20321 SW Birch St., #200, Newport Beach, California 92660; Fax 949-385-5165; E-mail address: dc@mckennonlawgroup.com.

I hereby certify that on March 4, 2024, I served the foregoing documents described as: PLAINTIFF JASON KIM'S OPENING TRIAL BRIEF on the interested parties as follows:

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☒ **ECF/CM:** I caused a true and correct copy thereof to be electronically filed using the Court's Electronic Court Filing ("ECF") System and service was completed by electronic means by transmittal of a Notice of Electronic Filing on the registered participants of the ECF System. I served those parties who are not registered participants of the ECF System as indicated below.

☐ I placed the ☐ original ☐ a true copy thereof enclosed in sealed envelope(s) to the notification address(es) of record and caused such envelope(s) to be delivered by ☐ **FIRST-CLASS MAIL** ☐ **OVERNIGHT DELIVERY**.

☐ **BY E-MAIL:** I electronically transmitted a true and correct copy thereof to the notification electronic mail address(es) of record before close of business for the purpose of effecting service and the transmission was reported as complete and without error.

☐ **FACSIMILE:** Based on ☐ courtesy ☐ court order ☐ agreement of the parties, I caused a true copy thereof to be served by transmitting via facsimile machine to the notification facsimile number(s) of record before close of business. The transmission was reported as complete, without error.

☐ **PERSONAL DELIVERY:** I caused ☐ the original ☐ a true copy thereof to be delivered by hand to the notification address(es) of record by an employee or independent contractor of a registered process service.

I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America and the State of California that the above is true and correct. Executed at Newport Beach, California on March 4, 2024.

NAME:

Debi Cartee
(Signature)

